(3)

No. 06-1347

In the Supreme Court of the United States

JAMES M. DUFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners violated the federal mail-fraud statute, 18 U.S.C. 1341, when they fraudulently procured money by misrepresenting their eligibility to participate in the City of Chicago's affirmative action contracting program.

2. Whether the court of appeals properly accorded a presumption of reasonableness to the sentence imposed by the district court, which was within the applicable range under the Sentencing Guidelines.

3. Whether the courts below properly applied the Sentencing Guidelines in determining that the offenses in this case resulted in a "loss" to the City.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B55) is reported at 464 F.3d 773. The opinion of the district court denying petitioners' motion to dismiss the indictment (Pet. App. H4-H15) is reported at 371 F. Supp. 2d 959. The opinion of the district court on sentencing of petitioner Duff (Pet. App. D24-D36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 2006. A petition for rehearing was denied on January 8, 2007 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on April 6, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Duff and Dolan pleaded guilty to, *inter alia*, mail fraud, in violation of 18 U.S.C. 1341. Pet. App. B18-B19, D1-D2. Duff was sentenced to 118 months of imprisonment and was ordered to pay restitution in the amount of $12,026,582.02. *Id.* at B19, D3, D9. Dolan was sentenced to 21 months of imprisonment. *Id.* at B19. Petitioner Stratton was found guilty by a jury of, *inter alia*, mail fraud. *Id.* at B18-B19. He was sentenced to 70 months of imprisonment and was ordered to pay $7,370,739 in restitution. *Id.* at B19. The court of appeals affirmed petitioners' convictions and sentences. *Id.* at B1-B55.

1. Petitioners and several other defendants engaged in "successful schemes to cheat the City of Chicago out of funds slotted for minority- and women-owned businesses and to swindle various workers compensation insurance providers out of proper premiums." Pet. App. B1. In order to participate in the City's women-owned business enterprise (WBE) program, Duff installed his mother, Patricia Green Duff, as the sole shareholder of Windy City Maintenance (WCM), even though "she had no real involvement with the business." *Id.* at B4. For many years, corporate officers of WCM, including Dolan, submitted renewal applications for the program "that reiterated the false description of [Patricia] Green Duff's role" in the company. *Id.* at B5-B6. As a result, WCM was able to obtain WBE certification throughout the 1990s, thereby obtaining City contracts that it could not otherwise have received. *Id.* at B6. WCM received $37,512,279 from those contracts. *Ibid.*

Duff employed a similar scheme to obtain minority-owned business enterprise (MBE) certifications for another company that he controlled, Remedial Environ-

mental Manpower (Remedial). Pet. App. B4-B5. Duff established Stratton, an African-American male, as the nominal majority owner of Remedial. *Ibid.* After the City denied Remedial's initial request for MBE certification, the company "submitted an entirely new application that reported Stratton was the sole owner of the business and that removed all of the troubling references to Duff and his companies." *Id.* at B8. The City granted that application. *Ibid.* After becoming a City-certified MBE company, Remedial obtained approximately $74,849,310 in contracts and subcontracts through the City's MBE program. *Ibid.*[1]

2. In a 33-count indictment filed in 2003, petitioners and several co-defendants were charged with violations of the federal racketeering, mail-fraud, wire-fraud, money-laundering, and tax statutes. Pet. App. B18-B19. Petitioners (along with defendant Patricia Green Duff) moved to dismiss the mail-fraud and money-laundering charges as they pertained to the WBE and MBE schemes. *Id.* at H4-H6. The district court denied that motion. *Id.* at H4-H15.

The mail-fraud statute establishes criminal penalties for any person who uses the mails to effectuate a

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[1] In another fraudulent scheme, Windy City Labor Services (Windy Labor), which was also controlled by Duff, obtained workers compensation insurance from a risk pool established by the State of Illinois. Pet. App. B10-B18. Duff kept Windy Labor's insurance premiums artificially low "by making what would turn out to be massive and long-term misrepresentations," falsely representing that a high percentage of Windy Labor's employees were "clerical" workers. *Id.* at B13. As a result of the "extensive scheme to hide the true nature of Windy Labor's business, the company paid approximately $1.09 million less in premiums than it should have." *Id.* at B18. The petition for a writ of certiorari does not challenge the application of the mail-fraud statute to that scheme.

"scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Relying on *McNally* v. *United States*, 483 U.S. 350 (1987), petitioners contended that the City's interest in the WBE and MBE programs was "purely regulatory" and could not be deemed "property" within the meaning of Section 1341. Pet. App. H7. The district court rejected that argument. The court explained that, whereas "no moneys of the state were involved" in *McNally* or in the subsequent cases on which petitioners relied, petitioners were accused of "falsely representing the identity of owners and management in Duff family businesses" and thereby "causing over a hundred million dollars in City money to go to businesses that were neither MBE's or WBE's." *Id.* at H7, H9.[2]

3. Duff and Dolan pleaded guilty to all counts against them. Pet. App. B19. Four other defendants, including Stratton, proceeded to trial. *Ibid.* The jury returned guilty verdicts as to all defendants except for Starling Alexander, a Remedial supervisor "who was only tangentially involved in the scheme." *Ibid.*

In determining Duff's sentence, the district court took into account the amount of the "loss" to the City of Chicago that resulted from WCM's fraudulent participation in the WBE program. See Pet. App. D27-D29. The

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[2] Petitioners also sought dismissal of the money-laundering charges in the indictment. Petitioners argued that, because the alleged "specified unlawful activity" underlying those charges was mail fraud, and the charged conduct did not constitute a violation of the mail-fraud statute, the money-laundering charges could not stand. See Pet. App. H14. Because the district court rejected petitioners' challenges to the mail-fraud allegations, the court likewise denied petitioners' motion to dismiss the money-laundering counts. *Ibid.*

government contended that the amount of the loss was $112,406,850 (the total monies received by the company under the relevant contracts), while Duff "contended that his company performed the work under the contract and that therefore there was no loss at all." *Id.* at D27. The district court adopted an intermediate position, holding that the relevant "loss" was the company's "profit on the contracts" and "calculat[ing] the profit as $10,933,000." *Id.* at D28, D29.

4. The court of appeals affirmed petitioners' convictions and sentences. Pet. App. B1-B55.

a. As in the district court, petitioners contended on appeal that their conduct was not encompassed by the mail-fraud statute because "the only loss Chicago suffered was to its regulatory interests." Pet. App. B21. The court of appeals rejected that contention, explaining that petitioners had "hatched and executed a plan to obtain fraudulently over $100 million in contracts and subcontracts from the city of Chicago by lying about the [WCM] and Remedial ownership structure." *Id.* at B23. The court found that petitioners' scheme did not simply deprive the City of "intangible" rights, but rather "precisely and directly targeted Chicago's coffers," and was thus "committed both against Chicago as regulator and also against the city as property holder." *Id.* at B25; see *ibid.* (explaining that the object of petitioners' fraudulent scheme "was money, plain and simple, taken under false pretenses from the city in its role as a purchaser of services").

The court of appeals further explained that, although the City of Chicago received the cleaning and janitorial services for which it had contracted, the City "completely lost the other type of services for which it was paying the contractors and the Duff companies—ser-

vices performed by an MBE or an WBE precisely because the company is a qualified MBE or WBE." Pet. App. B26. The court noted in that regard that "Chicago was aware that the services rendered by the MBEs or WBEs would not be the most efficient or the lowest-priced possible," and that the City "was willing to pay these premiums" in order to encourage the development of such enterprises. *Id.* at B27 n.3. For that reason, the court explained, "an efficient, established business, given the advantage of MBE/WBE status, would earn more than it would normally receive under a truly open bidding system, in which it would compete against similarly established companies with the same experience and efficiencies of scale." *Ibid.*

b. The court of appeals held that the district court had properly considered the "loss" to the City in calculating Duff's sentence, and it rejected Duff's contention that the amount of the relevant loss was zero. Pet. App. B29-B31. The court concluded that, pursuant to former Sentencing Guidelines § 2F1.1, comment. (n. 8(d)) (1998), which governed wrongful acquisition of government benefits, the district court should have used the full amount of payments received rather than the company's profit as the amount of that loss. Pet. App. B30-B31. The court declined to order a remand on that ground, however, both because the government had not cross-appealed and because use of the higher figure would not affect Duff's sentence. *Id.* at B31.

c. The court of appeals also rejected Duff's contention that his sentence was unreasonable. Pet. App. B36-B37. Because the sentence was within the range established by the Sentencing Guidelines, the court of appeals treated that sentence as "presumptively reasonable." *Id.* at B36. The court concluded that the district court

had "adequately explained the reasons for its sentence," *ibid.*, and had provided "a thoughtful and meaningful analysis regarding why Duff's crimes merited 118 months of imprisonment," *id.* at B37.

ARGUMENT

1. Petitioners contend (Pet. 6-20) that the conduct in which they engaged did not violate the mail-fraud statute, 18 U.S.C. 1341, because it did not deprive Chicago of "money or property." That contention lacks merit and does not warrant this Court's review.

a. Contrary to petitioners' contention (Pet. 8-11), the court of appeals' ruling in this case is consistent with this Court's decisions in *McNally* v. *United States*, 483 U.S. 350 (1987), and *Cleveland* v. *United States*, 531 U.S. 12 (2000). In *McNally*, the Court rejected the "intangible rights" theory of mail-fraud prosecution, holding that the mail-fraud statute in its then-existing form reached only schemes that seek to deprive victims of money or property. *McNally*, 483 U.S. at 356, 358-359. The Court stated in *McNally* that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360.[3]

In *Cleveland*, the defendants were charged with using false statements to obtain video poker licenses from the State of Louisiana. See 531 U.S. at 15. The Court held that the defendants' conduct was not covered by Section 1341. *Id.* at 20-27. The Court acknowledged that "video poker licensees may have property interests

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[3] Shortly after this Court's decision in *McNally*, Congress enacted 18 U.S.C. 1346, which provides that, for purposes of the mail- and wire-fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." See *Cleveland*, 531 U.S. at 19-20.

in their licenses," but found it dispositive that "the license is not property in the hands of the State." *Id.* at 25. The Court "conclude[d] that § 1341 requires the object of the fraud to be 'property' in the victim's hands and that a Louisiana video poker license in the State's hands is not 'property' under § 1341." *Id.* at 26-27.

Petitioners argue that this case is comparable to *McNally* and *Cleveland* because the effect of their conduct was "to deprive the City of its regulatory interest in promoting its MBE/WBE set-aside program through the spending of its funds to promote that interest." Pet. 9. Yet the very phrasing of that claim shows why the court of appeals rejected it. See Pet. App. B23-B25. Petitioners successfully defrauded the city "of its funds" (Pet. 9) rather than of a regulatory interest (such as the licenses at issue in *Cleveland*) not amounting to a property right. As the court of appeals correctly held, petitioners' scheme fell within the mail-fraud statute because they fraudulently obtained "money, plain and simple," using false pretenses to obtain funds "from the city in its role as a purchaser of services." Pet. App. B25.

Petitioners further contend (Pet. 8, 10) that, because their companies performed the relevant services as specified in the contracts, the City suffered no "pecuniary loss" or "economic harm." As the court of appeals recognized, however, the City did not in fact receive the benefit of its bargain because petitioners' misrepresentations frustrated the achievement of one of the City's purposes in spending the money—*i.e.*, to foster the development of minority- and women-owned businesses. See Pet. App. B26, B27 n.3. The City presumably could have procured the same services more cheaply had it not wished to encourage the growth of minority- and women-owned businesses, and it therefore did not re-

ceive everything it paid for when petitioners fraudulently diverted the City's payments to themselves. See *ibid.* The City was therefore defrauded of its money or property.[4]

b. Petitioners contend (Pet. 12-20) that a circuit conflict exists on the question whether the City's "right to control [its] spending" is a "property" interest for purposes of the mail-fraud statute. The cases on which petitioners rely are distinguishable, however. Unlike the instant prosecution, none of those cases involved fraud directed at an MBE, WBE, or similar program, and none involved a scheme whose purpose and effect was to divert the victim's funds to expenditures that did not fully accomplish the objectives of the relevant spending program.

In *United States* v. *Mittlestaedt*, 31 F.3d 1208 (2d Cir. 1994), cert. denied, 513 U.S. 1084 (1995) (see Pet. 12-13), a consultant to two local communities concealed his interest in real estate projects that he influenced local boards to favor. The court of appeals held that the consultant's failure to disclose his interest did not con-

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[4] That the City was defrauded of its money or property is further confirmed by this Court's holding in *Carpenter* v. *United States*, 484 U.S. 19 (1987). There, the Court concluded that the term "property" in Section 1341 is not limited to tangible property, but also encompasses intangible property such as "confidential business information." *Id.* at 25. The Court also held that Section 1341 does not require proof of "a monetary loss, such as giving the information to a competitor"; rather, "it [was] sufficient that the [victim] ha[d] been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter." *Id.* at 26-27. It follows *a fortiori* that petitioners' scheme, which diverted *tangible* property to an ineligible recipient, thereby preventing the City from using the funds to achieve the full range of its contracting objectives, is covered by the statute.

stitute mail fraud "unless the omission can or does result in some tangible harm." *Id.* at 1217. Because the instructions given at trial "effectively permitted the jury to convict [the defendant] for nothing other than a breach of fiduciary duty," *id.* at 1218, the court of appeals reversed. Here, in contrast, petitioners' deception harmed the City financially because, "[a]s the government clearly stated at oral argument, Chicago was aware that the services rendered by the MBEs or WBEs would not be * * * the lowest-priced possible," but the City was willing to pay a premium to help build minority- and women-owned businesses. Pet. App. B27 n.3.

The government's allegations that Chicago was fraudulently induced to make expenditures that did not fully serve the City's objectives similarly distinguishes the present case from *United States* v. *Evans*, 844 F.2d 36 (2d Cir. 1988) (see Pet. 13-14). In that case, Evans was charged with scheming to deceive the government about the true end-users of arms to be purchased by foreign governments. The court concluded that the government's interest in "prohibiting a particular use of a commodity that the government does not use or possess [*i.e.*, the arms sold to and owned by foreign countries] ordinarily does not create a property right." *Id.* at 42. Here, in contrast, the government did not seek to impose restraints on the resale of a commodity it had sold; rather, the mail-fraud statute was applied to a scheme to defraud the City of the benefit of its bargain.

In *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970) (see Pet. 13), the defendants engaged in aggressive sales pitches to private customers. The court reversed the defendants' mail-fraud convictions because the defendants' "agents did not attempt

to deceive their prospective customers with respect to the bargain they were offering." *Id.* at 1182. Here, by contrast, petitioners deceived the City into believing that its contractual payments would serve to foster minority- and women-owned businesses—an objective for which the City was willing to pay a premium.

The Third Circuit's decision in *United States* v. *Zauber*, 857 F.2d 137 (1988), cert. denied, 489 U.S. 1066 (1989) (see Pet. 14), is also inapposite. The defendants in *Zauber* were convicted of pre-*McNally* mail- and wire-fraud counts that charged them with depriving a union pension fund of the right to honest services by its employees. *Id.* at 143. Applying this Court's intervening *McNally* decision, the Third Circuit said that it would "not strain to interpret a defective indictment as implicitly alleging that the kickback scheme's purpose was to deprive the pension fund beneficiaries of money." *Ibid.* In contrast, the mail- and wire-fraud counts in the indictment in the present case did allege that petitioners and others engaged in a scheme to obtain money, specifically "to obtain fraudulently over $100 million in contracts and subcontracts." Pet. App. B23.

Petitioners' reliance (Pet. 14-15) on *United States* v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992), is likewise misplaced. The defendants in *Bruchhausen* devised and executed a scheme to purchase American technology and to smuggle it to Soviet-bloc countries. See *id.* at 466. Although representatives of the American manufacturers who had sold the defendants the technology testified that they would not have entered into the transactions if they had known the ultimate destination of the goods, see *ibid.*, the court held that the manufacturers had not been defrauded of "property" within the meaning of the mail-fraud statute, see *id.* at 467-468. The court ex-

plained that, although a "manufacturer may have an interest in assuring that its products are not ultimately shipped in violation of law, * * * that interest *in the disposition of goods it no longer owns* is not easily characterized as property." *Id.* at 468 (emphasis added). Here, by contrast, the harm to Chicago was not that the contractual payments petitioners received were subsequently disbursed in ways that the City found objectionable. Rather, petitioners' scheme frustrated the full achievement of Chicago's contracting purposes by inducing the City to pay money to companies whose participation in the program did not further the City's objective of fostering minority- and women-owned businesses.

2. Petitioners contend (Pet. 21-24) that the court of appeals erred in treating the sentences imposed by the district court, which were within the applicable ranges under the Sentencing Guidelines, as "presumptively reasonable." Pet. App. B36. After the petition was filed, this Court issued its decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007). The Court in *Rita* held that a court of appeals may apply a presumption of reasonableness in reviewing a within-Guidelines sentence. See *id.* at 2462-2468. In light of that decision, petitioners' challenge lacks merit and does not warrant review.

3. Petitioners contend (Pet. 24-26) that the courts below erred in concluding that petitioners' offenses caused a "loss" to the City within the meaning of former Sentencing Guidelines § 2F1.1 (1998). Petitioners appear to argue (see Pet. 25) that, because the "loss" Guideline is limited to crimes involving "pecuniary harm" to the victim, any impairment of the City's efforts to foster minority- and women-owned businesses would not trigger the Guideline. That argument lacks merit and does not warrant this Court's review.

Petitioners' scheme caused the City to pay more than $100 million to companies that were not eligible to receive the funds. The existence of a "loss" to the City is particularly apparent in light of Chicago's willingness to pay "premiums" (Pet. App. B27 n.3) in order to achieve the full range of its contracting objectives, *i.e.*, to support and foster MBEs and WBEs. In any event, petitioners do not contend that a circuit conflict exists on this question. And, to the extent that the applicability of the relevant Guideline to cases like this one requires clarification, the Sentencing Commission rather than this Court is the body primarily entrusted with that task. See *Braxton* v. *United States*, 500 U.S. 344, 347-348 (1991).

Petitioners further contend (Pet. 26-29) that the court of appeals erred in determining, under the application note covering wrongful acquisition of "government benefits," that the "loss" to the City was equal to the full amount of the contractual payments (more than $100 million) that petitioners' companies received, rather than to the profit ($10,933,000) that petitioners realized on those contracts. See Pet. App. B29-B31, D27-D29, J1. The Seventh Circuit's holding is correct and (as petitioners acknowledge, see Pet. 26-27) is consistent with the only other court of appeals decision to address the question. See *United States* v. *Bros. Constr. Co. of Ohio, Inc.*, 219 F.3d 300, 317-318 (4th Cir.), cert. denied, 531 U.S. 1037 (2000). The court of appeals' determination that the higher loss figure should have been applied, moreover, did not affect the sentence that was ultimately imposed. See Pet. App. B31. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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